IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8722 of 1999

with

SPECIAL CIVIL APPLICATION NO 11258 OF 2002

Date of Decision :

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UNION OF INDIA & 1 - Petitioner(s)

Versus

NM DHOBI - Respondent(s)

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Coram :

The Hon'ble Mr. Justice Bhawani Singh, Chief Justice

The Hon'ble Mr. Justice H.K. Rathod

Whether approved for Reporting ?

Appearance:

Ms. Meghaben Jani Western Railways.
Mr. K.K. Shah for applicant employee.

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Per : H.K. Rathod, Judge (CAV):

Heard learned advocate Ms. Meghaben Jani for the petitioner Union of India and Mr. K. K. Shah, learned advocate appearing for the respondent employee Shri N.M. Dhobi.

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Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. In these two petitions, both the respective parties have challenged the order passed by the Central Administrative Tribunal, Ahmedabad Bench, Ahmedabad dated August 20, 1999 in OA No. 305 of 1999, therefore, both the petitions are disposed of by this common judgment. Brief facts of the present case are as under:

3. Applicant employee was recruited in the establishment of the respondents in the year 1957 as a Signaler in reserved quota of S.C.. Railway Department promoted him in December 1974 to the post of ASM against quota for reserved candidates. Applicant employee refused promotion on ground that he was recruited against the general category and not against reserved category. Then, applicant employee was served with a charge sheet for getting advantage in original recruitment in reserved quota by showing himself as SC Candidate. Applicant employee denied the charges. Then, departmental inquiry was conducted and inquiry report was submitted to Disciplinary

Authority. Then, he was removed from service by order dated December 3, 1976. Applicant employee preferred an appeal to the Divisional Superintendent, Baroda which was rejected. Then, applicant employee applied for review to reviewing authority namely DSP DRC to review the order of punishment. The reviewing authority reappointed him in service. Then, representation was made to General Manager, Western Railways to restore him in the original status along with all consequential benefits. General Manager refused to accept his prayer. Then, one more representation was made to the General Manager and also to the Railway Board. Railway Board disposed of his representation. Matter of condonation of break in service was taken up by Union which was also not accepted. Consequently, the applicant employee lost past service of 18 years from December 31, 1958 to December 31, 1976. He was treated as a fresh entrant from April 18, 1978 when he was reappointed. Due to loss of 18 years service, the applicant employee has lost chances of promotion and also suffered loss of retirement benefits. On the basis of above facts, the applicant employee filed OA NO. 305 of 1991 with a

prayer to quash the order dated 12th April 1990 communicated to the Union vide letter dated April 17, 1990 and to treat the service of the applicant employee continuous with all consequential benefits of past service.

4. The Western Railways filed reply. According to Western Railways, the applicant employee had shown his community as SC in his application. Applicant employee has failed to point out fact that he does not belong to such caste. He was served with a charge sheet for showing wrong information at the time of appointment and after inquiry, he was removed from service. Appellate authority rejected his appeal but reviewing authority after reconsidering his case, treated him as a fresh entrant from April 18, 1978. Representation of the applicant for condonation of break in service was considered and rejected by all the authorities of the Western Railways. His earlier service will not be counted for any purpose. Break in service from the date of removal till the date of reappointment cannot be condoned since applicant employee was reappointed as a fresh entrant on

humanitarian ground. His pensionary and other benefits have been counted from date of his reappointment. Therefore, Western Railways prayed to reject Original Application. Applicant employee filed rejoinder and ultimately, CAT decided controversy and held that applicant is entitled for computation of period from the date of his initial appointment from December 31, 1958 to December 31, 1976 which period shall be added to the period from April 18, 1978 until his date of retirement and shall be counted for purpose of his pension and other retirement benefits. Tribunal directed that this shall be done by the respondents within three months from date of receipt of copy of order. The tribunal decided on 20th August, 1999.

5. Western Railways challenged this order. Applicant employee also challenged this order with a prayer to grant all consequential benefits by restoring his original seniority and promotion from date of his junior were promoted with pay fixation and arrears as well as retirement benefits. Applicant employee, after order dated August 20, 1999 passed by CAT,

filed Review Application NO.3 of 2000 in OA No. 305 of 1991 which was rejected by Tribunal on February 7, 2000. Therefore, both orders of Tribunal dated 20th August 1999 and 7th February, 2000 have been challenged by the applicant employee by filing Special Civil Application NO. 11258 of 2002.

6. We have perused record of both the petitions and original service sheet of the applicant placed on record by the Western Railways. Learned advocate Ms. Megha Jani for Railway Department has submitted that the Tribunal has not considered the point of delay in filing the Original Application in the year 1991 before the Tribunal. She also submitted that the allegations made against the applicant were ignored by the Tribunal. Applicant employee has suppressed material point that he was not belonging to SC Community. She also submitted that break in service due to resignation/removal/dismissal cannot be condoned and it is not permissible under the policy of the Railway Authority. She vehemently emphasized that the order dated April 13, 1978 was an order of reappointment as a fresh entrant which was accepted

by the applicant and did not challenged the same before Tribunal. She also submitted that once order of reappointment is accepted by the applicant, he is not entitled to claim any benefits which are contrary to the order of reappointment dated April 13, 1978. Decision of the apex court in UP Awas Evam Vikas Parishad and others vs. Rajendra Bahadur Srivastava and another [1995 Supp. (4) SCC 76] is not applicable to the facts of this case. She also submitted that from the date of removal till the date of reappointment was a period of more than one year, therefore, such break should not be condoned as it was of more than one year. It is also a matter of policy and even according to Railway Service Pension Rules, 1993, applicant is not entitled for condonation of break in service for pensionary benefits. She also submitted that the removal order is not set aside by the reviewing authority but because of sympathetic consideration, order of reappointment was passed by reviewing authority with clarification to treat him as a fresh employee. This order dated April 13, 1978 was not challenged by applicant and he accepted the same. She also

submitted that review application was filed by the applicant with a view to avoid contention of delay in challenging the communication to Union dated July 17, 1990 and, therefore, order of the CAT is liable to be quashed by dismissing the Original Application No. 305 of 1991.

7. Learned advocate Mr. K.K. Shah submits that applicant is entitled for condonation of break in service when order of reappointment is passed by the reviewing authority. He also submits that reviewing authority has impliedly set aside the order of removal. He also submits that there is no delay in filing of OA before the Tribunal because after rejection of the representation, the applicant had moved the Union and there was correspondence between Western Railways and Union. Union received communication dated July 17, 1990 from Western Railways which gave cause of action to applicant to file OA before the Tribunal. He also submitted that on merits, the applicant was innocent and he had not made any misrepresentation before Railway for getting service. In the application form, "SC" was not filled

up by him but instead of that, "LC" was mentioned by him. According to him, looking to the caste Dhobi, meaning of LC is lower community. Applicant was not aware about SC Benefits. Applicant was bona fide and he was not aware about appointment made by Western Railways against reserved quota of SC. At the time when the promotion was issued in his favour, in reserved category, it was rightly pointed out by him to Western Railways that he was not a member of Scheduled Caste, therefore, there was no misrepresentation by applicant in application form. According to him, order of removal was bad and illegal. He relied upon decision of apex court in UP Awas Evam Vikas Parishad and others vs. Rajendra Bahadur Srivastava and another [supra] . He also relied upon decision of Central Administrative Tribunal, Bombay in Keshav Samsher Singh versus Union of India and others [(1995) 31 Administrative Tribunals Cases 14]. He submitted that denial of benefit of continuity of service has caused damage to the applicant and his past 18 years service has been wiped out. He also submitted that application form for SC Candidates and General Category Candidates are

different and applicant had filled up form of General Category. He also submitted that it was a mistake on the part of Western Railways but there was no misrepresentation or misconduct on the part of applicant, therefore, according to him, tribunal has rightly condoned the break in service and rightly granted pensionary benefits. However, he further submits that applicant is entitled for all consequential benefits including seniority, promotion, revised pay scale and pensionary benefits for whole service. He also submitted that punishment of reappointment is not provided under disciplinary rules, therefore, obviously, reappointment ordered by the reviewing authority is contrary to the disciplinary rules, therefore, he submitted that petition filed by Western Railways may be rejected and the petition filed by applicant be allowed.

8. We have considered the submissions made by learned advocates for the parties. Most of the facts are not in much dispute between the parties. The Memorandum No. E/308/1/2/46 of 16th March, 1975 was served upon the applicant. Following charges were laid :

> "You have taken undue advantage for appointment as TFC Signaler against reservation quota of "SC" showing yourself belonging to SC community in the application form submitted to Rly Service Commission Bombay in January, 1957.
>
> When you are promoted to scale Rs.425-640 vide Memorandum No. ET/839/3/14 (P.V dated 17.12.74 against the reservation of SC, you have stated that you are not belonging to SC Community under your letter dated 18.12.74. You have also failed to point out this at the time of appointment or executing service sheet. Form of service commission application was shown to you. Do you accept these charges ?"

9, Applicant denied charges. Then, departmental inquiry was conducted against him. On August 3, 1976, inquiry officer submitted his report. In said report, inquiry officer has referred to item No.5(1) of the Railway Service Commission Form No. 74844 as under :

“5(1) Are you a member of SC or ST ? YES

If so, mention caste on community : DHOBI.”

10. Inquiry officer came to conclusion that some correction is made subsequently in application form 74844 with mala fide intention to secure job and promotion against reservation quota of SC. On basis of report of inquiry officer, disciplinary authority passed order of punishment dated December 31, 1976 after issuing show cause notice dated September 18, 1976 and receiving defense dated September 28, 1976. Applicant preferred appeal to the appellate authority which rejected it on March 16, 1977and following order has been passed by the appellate authority :

> “ I have gone through the appeal of the delinquent employee. He is trying to say, that he is a Dhobi and, therefore, he comes in 'low income group' and he considers himself to be a member of the 'lower community.” Having secured his entry to the Railway Service claiming himself to be member of of Schedule Caste which he knew he was not, started declaring himself as “L.C.”. I am convinced it is not a mistake. It

is a wilful mischief played by the employee to secure admission to the Government service. He pleads, that while filling up form in January, 1976, he made a genuine error as if he would have filled up the form entirely himself without seeking anybody's help. That the Railway Service Commission failed to detect this cannot be made a ground to give credit to this employee for retaining him in service.

2. The employee is sharp in inventing names such as general community, low community etc. etc. and repeatedly quotes them to gain an advantage.

3. The employee is trying to manifest himself as a truthful man by informing the Administration that he should not be promoted in the schedule caste quota as he was not belonging to that community. What happened when he was offered an appointment ? Was he not informed that he is being recruited as a member of the Scheduled Caste ? The memorandum of appointment (No. ET/1136/2 dated 4.12.58) as Tfc. Sigr.cum-ASM shows the name of this employee on top declared

as Scheduled Caste. The service book has been signed by him in the same ink as his signature which shows letters “S.C.” below the name of the employee. The identity in the pen used for signing the name and addition of the word “S.C.” is unmistakable. The employee is trying to say that everybody else has made a mistake in appointing him as a member of the SC Community and promoting him thereafter SC which he is not.

4. The employee considers reference to his application to the CE (S&C) dated 14.3.73 for the post of AMVI as relevant. This reference is very relevant to prove the habitual craftiness of the delinquent employee. In 1973, he was not new to the Railways. He knew very well that there is no such word as Lower Community. Why did he use it in his application ?

5. From the evidence recorded, I am fully convinced that the charges against the employee are fully established. Whatever else he writes does not make sense. Against the weight of such

overwhelming evidence against him, I do not see what purpose will be served by granting him a personal hearing, which is refused. Under the circumstances, he has been correctly taken up. Punishment stands. "

11. Then, applicant preferred review petition before Reviewing Authority on 13.9.1977. Decision of Reviewing Authority communicated to applicant by Divisional Office, Baroda letter dated 13.4.1978 is reproduced as under:

"Shri N.M. Dhobi CASM ANND Scale Rs.330-560 ® who was removed from service from 31.12.76 is now reappointed as ASM Scale Rs.330-560 ® on pay Rs.404/- p.m. As a fresh and posted at PIO vide DS(E) BR C's letter quoted above."

12. Against the said decision, on 20th June, 1979, again representation was made by applicant for review of DAR Case. Review (Representation) dated 28th June, 1979 submitted by applicant and decided by General Manager which was communicated to applicant by DRM(E)

Office Baroda vide letter dated December 26, 1980 is as under:

> " I have carefully gone through the case and notwithstanding the fact that the correction made in the application dated 14.3.73 by scoring out L and writing S, is not initialled by Shri Dhobi, the fact remains that there was a tacit attempt to pass off a SC. It is difficult to say whether Shri Dhobi derived any undue benefit by doing so. The entry in his service record in his own hand writing also confirms that he declared himself as belonging to the SC. Having regard to these facts, I have come to the conclusion that the punishment awarded is just and no further concession is merited. He would have earned the higher punishment of removal from service if it could be proved categorically that his false declaration gained him undue advantage at any stage but on this score, he gets benefit of the doubt. "

13. Then, again, on 20.9.1981, further representation

was made by way of review to the General Manager, Western Railways and by letter dated 11th November, 1983, to the Secretary and Railway Board. The DRM Baroda, by letter dated 14th March, 1984, decided his representation as under:

> "1) You were appointed on 1.1.59 as traffic signaler in scale of Rs.60-150(A) on pay of Rs.60.00 p.m. Through Railway Service Commission form No. B-74844 in column 5(1) meant for SC/ST candidate, the word "YES" is mentioned and caste or community as "Dhobi".
>
> 2) Again vide application dated 14.3.73, it has been stated that you are coming from SC community.
>
> 3) Accordingly, you were promoted against "SC" quota in scale Rs.425-640 ® vide order No. / 83/3/14 Pt.V dated 12.12.74.
>
> 4) This promotion was refused by you stating you are not 'SC' as per Government of Gujarat Gazette Part VI vide app.dt.18.12.74. You are removed from service vide NP No. E/308/10/3/46

of 31.12.76 effecting from 2.1.77.

On appeal to COPS CCG you are reappointed as AS scale Rs.330-560 ® on pay of Rs.404/- vide HQ Office letter No. E/DA/308/30/4/271 dated 22.3.78, conveyed to you vide this office letter No. E/308/10/3/46 dated 13.4.78 and reappointed from 20.4.78.

GM's decision was conveyed to you vide letter of even No. dated 26.12.81, in which the case was considered by GM and advised that -

'The punishment awarded is just and no further concession is merited. As regards any clerical error in your case is not in order for the reason that you are shown as "SC" on and from appointment as Traffic Signaler vide HQ Office letter No. E/1176/2/4/1 dated 2.12.58, and this office No. ET/1136/2/1/ dated 4.12.58.

The remarks were passed in service sheet which was prepared in your presence and seen read and

signed by you on 27.12.58, before appointment on 1.1.59.

Regarding allegation of favoritism to Shri P.J. Varma, ASM –BRC Dn. And Shri SP Vasava ASM ND, it is advised that no such discrimination has been made as stated below.

Shri PJ Verma, ASM BRC dn. has been relieved and transferred to N. Rly on 22.3.75 and his records etc. have been transferred to that Railway on 26.2.76, and as such, no light can be thrown as he is no more in this Railway. As regards Shri SP Vasava, ASM ND, the name should be CP Vasava, Shri CP Vasava is "ST" but was not considered as fit for promotion as "AINL" But he was subsequently promoted as ATNL scale Rs.470-750 ® and DY TNL scale Rs.700-900 ® against ST point and is at present working as CTNL ADI on 840-1040 ® on ad-hoc basis. Railway Board has been apprised of this position and as desired by the Railway Board, you are hereby advised that your above said representation stands disposed off. "

14. Thereafter, on 17th July, 1989, representation was made with a request to condone break in service to General Manager, Western Railways by applicant. Decision thereon was taken by Railway Board vide letter dated 12th April, 1990 communicated to Union vide letter dated 17th July, 1990. 69. Item No. 98/89 on page 4 (Annexure "RJ") is relevant and quoted as under:

"69. **Item No. 98/89**

EU1160/68/728/89 SPO (T)

Condonation of break in service of Shri Natvarlal M. Dhobi ASM BRC Division.

> Union have been advised under letter No. EU1160/68/728/89 dated 17.7.90 that Railway Board under letter No. E(REP)I-89-121-19/545 dated 12.4.90 had advised that as a matter of policy condonation of break in service due to resignations, removals and dismissals is not permissible. (Item finalized). "

15. In this back ground referred to above, Western Railways has finalized issue that applicant is not

entitled for condonation of break in service due to resignations/removals and dismissals as a matter of policy. Applicant has made misrepresentation to the Western Railways that he was a member of SC Community on two occasions. Those allegations were found to be proved and removal order was passed by Disciplinary Authority after holding departmental inquiry against applicant. In such serious misconduct, punishment of removal is considered to be a proper and legal punishment , decided by the apex court and High Court in number of cases [See : Kendriya Vidyalaya Sangathan v. Ram Ratan Yadav (2003 AIR SCW 1126); R. Vishwanatha Pillai v. State of Kerala (2004 Lab. IC 556); Ravindra Ramjorbhai Oza versus Western Railway (2005 {1} GLH 72].

16. Question raised before us is, whether applicant is entitled for condonation of break in service for period prior to date of his reappointment. Facts are to the effect that order of removal was not challenged by applicant before Tribunal. The Tribunal has not set aside order of removal and order of reappointment. Order of reappointment as a fresh

entrant dated 13.4.1978 was also not challenged by applicant but said order was accepted by applicant and he resumed duties with effect from 18th April, 1978. We have perused original service sheet in which "SC" is written below the name of the applicant and service sheet bear signatures of the applicant. Railway Service (Disciplinary and Appeal) Rules, 1968, Rule 25 Part VI is relating to revision and review. The authority under Rule 25 can confirm, modify or set aside order or confirm, reduce, enhance or set aside penalty imposed by order or impose any penalty where no penalty has been imposed or remit case to the authority which made order or any other authority directing such authority to make such fresh inquiry as it may consider proper in the circumstances of the case or pass such orders as it may deem fit. Therefore, revisional and reviewing authority has power to pass such orders as it may deem fit, therefore, contention raised by learned advocate Mr. Shah that reappointment is not prescribed as punishment under Rules, therefore, order of reappointment is bad, cannot be accepted in light of provisions of Rule 25 of said Rules of 1968

which provides that revisional authority and reviewing authority has power to pass such orders as it may deem fit. Revisional and reviewing authority has not set aside order of removal but, with sympathetic approach, granted only reappointment as a fresh entrant. Said order has been accepted by the applicant and requested the authority to condone break in service. Representation dated 17th July, 1989 after rejection of representation dated 11th November, 1982 by order dated 14th March, 1984 suggests that applicant has accepted order of reappointment and then made request to the General Manager, Western Railways to condone break in service. In such circumstances, when order of reappointment is accepted which does not include benefit of continuity of service impliedly or expressly, therefore, applicant is not entitled for condonation of break in service. Applicant is not having any legal right to receive benefit of continuity of service. It is not impliedly included in case of reappointment. In case of reappointment, employee would loose his past service for all purposes. Order of reappointment is not punishment

but result of sympathetic approach made by concerned authority. Tribunal has not given any reason on what basis, it has granted benefit of continuity of service or condonation of break for purpose of pension and other retirement benefits. Reliance placed by the Tribunal on decision of apex court in case of UP Awas Evam Vikas Parishad and others v. Rajendra Bahadur Srivastava and another (supra) is misconception. The facts before the apex court in UP Awas Evam Vikas Parishad and others v. Rajendra Bahadur Srivastava and another (supra) are totally different. In aforesaid case, order of termination was set aside. High Court, while allowing writ petition by order dated 17th July, 1993, set aside the order of termination dated December 31, 1971 and directed for benefits of his past service including the benefit of seniority, increment and promotion as if his service has not been terminated. This order of the High Court was set aside by apex court by declaring it as illegal but apex court held that employee is entitled to computation of period from the date of his initial entry for purpose of pensionary benefits only and to no other relief. This

being mere order passed by apex court, no ratio has been laid down by apex court. In such case, when reappointment order is passed and accepted by employee, then, he is legally not entitled for benefit of continuity in service or condonation of break in service as a matter of right. Therefore, in the circumstances of this case, this judgment is not helpful to applicant. In Keshav Samsher Singh v. Union of India and others (supra) also, facts are totally different. Central Administrative Tribunal, Bombay set aside termination order and granted benefit of continuity of service whereas in order of removal remains as it is and reappointment order has been accepted by applicant and did not challenge the same before any forum. Not only that, Tribunal has not set aside order of removal and reappointment. Therefore, tribunal has not properly applied mind and direction issued by apex court in UP Awas Evam Vikas Parishad and others v. Rajendra Bahadur Srivastava and another (supra) has been blindly applied to facts of this case and granted benefit of condonation of break with pensionary and retirement benefit. Decision of the CAT Bombay in Keshav Samsher Singh v. Union of India and others (supra) is also not applicable to facts of this

case. In present case, no penalty has been imposed by revisional authority while granting reappointment to applicant. Revisional/Reviewing Authority has exercised power under Rule 25 enabling it to pass appropriate order it may deem proper. So, it is not a case of setting aside order of removal or imposition of any other penalty to applicant. Learned advocate Mr. K.K. Shah has relied upon apex court decision in SS Rathore v. State of MP [AIR 1990 SC 10] to point out that in service dispute, cause of action would arise from date of order of higher authority and not from date of adverse order and where no order is made by higher authority within six months from date of remedy is availed, the date on which six months time expired. This decision is not applicable to facts of this case because, lastly, on 14.3.84, representation of the applicant dated 11th November, 1982 was decided against applicant, thereafter, applicant remained silent upto 17th July, 1989. In-between, no challenge by applicant either to adverse order or no proceeding is filed by applicant within period of six months. However, apart from that, we are not examining the question of delay in filing of OA before Tribunal but we are examining merits of the matter, whether applicant is entitled to benefit of condonation of break in service or not?

Tribunal has not discussed on what basis applicant is entitled for said benefit. No reasons have been recorded by tribunal. Tribunal granted benefits in favour of the applicant by merely relying upon decision of apex court in UP Awas Evam Vikas Parishad and others v. Rajendra Bahadur Srivastava and another (supra). The order of CAT is not legal but based on sympathy and sentiment. According to us, this is nothing but clear case of non application of mind by tribunal. In case of reappointment which does not include continuity of service, benefit of past service cannot be granted by condoning break when order of reappointment has been accepted by applicant employee. Once order of reappointment has been accepted by applicant and resumed duties without any protest and enjoyed benefits flowing from said order, then, applicant is estopped from claiming benefit of past service and other consequential benefits. Apex court has examined the issue that once reinstatement order passed by labour court denying back wages for intervening period and then employer ordered for reinstatement and accepted by the employee, then, subsequent challenge against denial of back wages by filing of

petition is not maintainable and it was not entertained by apex court on ground that the reinstatement without back wages has been accepted by employee, then, to challenge back wages part subsequently is not maintainable. [See : Sanat Kumar Dwivedi versus Dhar Jilla Sahakari Bhoomi Vikas Bank Marayadit and others (2001) 9 SCC 402; State of Punjab v. Krishan Niwas (1997) 9 SCC 31:1997 SCC (L&S) 998: (1997) 3 Scale 338].

In view of above discussion, according to our opinion, applicant is not entitled to benefit of condonation of break in service and on that basis, pensionary and retirement benefits, therefore, order passed by CAT in OA No.305 of 1991 dated August 20, 1999 is hereby set aside. Said OA No. 305 of 1991 is hereby dismissed. Consequently, Special Civil Application No. 8722 of 1999 is allowed and Rule is made absolute. Special Civil Application No. 11258 of 2002 is hereby dismissed and Rule is discharged. No order as to costs.

[BHAWANI SINGH]
CHIEF JUSTICE

[H.K. RATHOD]
JUDGE

Vyas